DOCUMENT RESUME

ED 136 362 EA 009 273

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TITLE Elections, Demands and Negotiations in Public Employment.
PUB DATE [77]
NOTE 26p.

EDRS PRICE MF-$0.83 HC-$2.06 Plus Postage.
DESCRIPTORS *Collective Bargaining; Employer Employee Relationship; *Government Employees; Guidelines; Negotiation Agreements; Unions

ABSTRACT

There are many similarities in collective bargaining as it is carried on in different types of political subdivisions. Where organizations are competing for the right to represent a group of workers, the concept of "majority rules" generally prevails. The election and designation of a specific bargaining unit occasionally needs clarification in each local setting. After recognition comes the first step in the bargaining process, the presentation of proposals and demands to the board. This is customarily the responsibility of the persons chosen or hired as employee representatives. In order to assure that adversarial feelings do not hamper job performance, public governing boards are well advised to consider a third-party bargaining representative. However, some research indicates limitations on negotiations in which boards are represented by outsiders. More often than not, the union has no options--its representatives will come from its ranks. The thread running throughout the entire process of proposal and demand negotiation must be good faith, but hard bargaining does not indicate lack of good faith. (Author/JG)

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ELECTIONS, DEMANDS AND NEGOTIATIONS IN PUBLIC EMPLOYMENT

by

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Introduction

There are many similarities in collective bargaining as it is carried on in any of the types of political subdivisions. This is not to suggest that personnel problems in a school, for example, can be better solved when a mayor or city council decides to intervene in behalf of a local school board or district superintendent. To the contrary, experience suggests that each agency does best when limiting its efforts to its own bailiwick. But, the similarities of public employment conditions indicate that a great deal can be learned from considering the larger picture.

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Partially as a consequence that public bargaining is a new field, local units or unions have typically sought to find bargaining representatives from within the local group. Very large locals have hired professional representation. The vast majority of such public employee locals are not large; that is, the teacher's local in the New York City Public Schools, representing nearly 80,000 employees, is unique. Within the 700,000 member American Federation of State, County, and Municipal Employees (AGSCME), most locals would be small. The same would be true of the National Education Association locals. Locals composed of non-professional employees sometimes have sought professional negotiators from their national group; however, local professional, e.g. teacher, unions typically have carried out their own bargaining endeavors, with some assistance from state and national offices.

Choosing the Bargaining Unit

Deeply ingrained within the American Ethic is the concept that "the majority rules." This concept has been carried into the process of choosing a bargaining unit. Where there are organizations competing for the right to represent a group of workers at the negotiating table, the organization garnering a majority of votes generally will be granted this right.

> Most state statutes have already authorized "exclusive" representation rights which give the organization with authorization to represent the majority of employees in the appropriate bargaining unit the right and the duty to represent all employees in that unit.(1)

A brief sampler of existing statutes which address the topic of choosing that organization which will be the representative unit for the employees of the unit reveals both similarity and difference. From Connecticut, the 1965 Act Concerning the Right of Teachers' Representatives states:

> Any organization or organizations of certificated professional employees of a town or regional board of education may be selected in the manner provided herein for the purpose of representation in negotiations with such boards with respect to salaries and all other conditions of employment. A representative organization may be designated or elected for such purpose by a majority of all employees below the rank of superintendent in the entire group of such employees of a board of education or school district or by a majority of such employees in separate units...Section 10-152b

With a decade or more of experience in public sector bargaining upon which to draw, Iowa passed a more comprehensive statute in 1974. It covers all public employees in the state. Within the Iowa Public Employment Relations Act, the legislature spoke to the topic of elections, in detail.

1. Upon the filing of a petition for certification of an employee organization, the board shall submit two questions to the public employees at an election in an appropriate bargaining unit. The first question on the ballot shall permit the public employees to determine whether or not such public employees desire exclusive bargaining representation. The second question on the ballot shall list any employee organization which has petitioned for certification or which has presented proof satisfactory to the board of support of ten percent or more of the public employees in the appropriate unit.

2. If a majority of the votes cast on the first question are in the negative, the public employees shall not be represented by an employee organization. If a majority of the votes cast on the first question is in the affirmative, then the employee organization receiving a majority of the votes cast on the second question shall represent the public employees in an appropriate bargaining unit.

3. If none of the choices on the ballot receive the vote of a majority of the public employees who could be represented by an employee organization, the board shall conduct a runoff election among the two choices receiving the greatest number of votes.

These selections from Section 15 of the Iowa statute stand as good examples of the Iowa legislature's determination to leave little to chance, to be extremely mandatory.

Although this part of the Iowa statute is strongly dependent upon the rule of the majority concept, the preceding section of that Act allows an employing board to recognize, for purposes of exclusive bargaining representation, an employee organization which has as members at least 30% of the employees of the unit.

Not only from the examination of legislation, but also from reading research into unique organizational problems can be found helpful insights into the topics of election and recognition. A case study of the impact of the movement to unionize prison personnel in Ohio is a good case in point. Ohio lacks a collective bargaining statute for public employees. Negotiations have led to contracts, but the case law basis for such action does not preclude multiple unions in single job settings. To help end union rivalry, the state's

Department of Administrative Services developed guidelines for union recognition. The executive branch has been the active agent for public employment collective bargaining.(2) Similarly lacking legislation, in 1971 New Mexico's attorney general delivered opinions that public employees could bargain, and that state's personnel board issued the necessary regulations. Some states stipulate negotiations; some call for "meet and confer." These selected statutes and situations reveal some differences between states, some differences within a state (depending upon specific conditions) and at the same time, confirm the earlier stated truism about the need for majority support.

In its infancy, organized labor was consistently frustrated by the stand of management, the position of the courts, and government hostility, generally. From the founding of this country until the 1930's, it was almost impossible for workers to choose a bargaining unit. From a legal point of view, it was not allowed, as indicated in an early day legal observation.

> The hostility of the courts was first given vent in the criminal conspiracy doctrine. This doctrine, "imported" by the American courts from English common law at the turn of the 19th century, was unbelievably narrow by modern standards. The doctrine flatly concluded that combinations of workmen to raise wages were criminal conspiracies and hence illegal...the shadow of the conspiracy doctrine hung heavily over organized labor throughout most of the 1800's.(3)

The rights of public employees have paralleled that of private labor. Regarding union membership for teachers, a Chicago court said in 1917, that ". . . it was inimical to proper discipline, prejudicial to the efficiency of the teaching force, and detrimental to the welfare of the public school system."(4)

Schools would not hire teachers who were union members, and teachers who were organizers were dismissed from their jobs. Inasmuch as organizing must precede election and recognition, such attitudes were effective deterrents. Now, that issue has apparently been resolved with the ruling in McLaughlin v. Tilendis (1968), a circuit court decision. That court declared that the First Amendment rights include the rights to form and join a labor union, and that the Civil Rights Act of 1971 provides remedy for employees who are dismissed because of their exercise of Constitutional rights.

There is no reason to believe that any court would now rule differently in a similar suit coming from some other category of the public employment sector; McLaughlin and Steele (his colleague) were teachers in Illinois.

The state statutes on election vary. Obviously, elections must conform to prevailing statutes, or they are open to question, with the possibility that they may be overturned in court. In order to assure the integrity of bargaining

unit elections, an outside party might be called upon. The American Arbitration Association has suitable resources, and is ". . .especially capable of handling the plethora of details associated with a representation election. In order to be adequately prepared for an election, the following questions must be answered:

1. Who will be eligible to vote? It may be helpful in answering this question to list those classifications of employees who will be ineligible to vote. Consideration must be given to long-term substitute employees, contract employees on official leave, etc.

2. When will the vote be held? On what day and during what hours will the polls be open? What will be the date of run-off election if one becomes necessary?

3. Where will the polling places be located? Junior and senior high schools are logical locations because they are strategically located throughout the district and usually have ample parking facilities. Where there are competing unions, one of the unions may argue for polling places on the basis of the location of its membership. The expense of establishing a polling place in each school is usually prohibitive. Polling places at locations other than the schools provide a satisfactory arrangement.

4. Who will be the election clerks at the polls? How many official observers from each organization on the ballot will be allowed at the polls?

5. What procedure will be used to list eligible voters, identify voters, challenge ballots and resolve the challenges.

6. What safeguards will exist to protect the secrecy of the ballot?

7. What shall be the wording of the question to be presented to the eligible voters on the election machine or paper ballot?

8. In what order will the choices be placed on the ballot? This can be determined by the flip of a coin. The ballot should provide for a choice of "no organization" as well as for the choice of the organizations, by exact title, seeking to represent the employees.

9. What vote is necessary to win the election?

10. What notice of election and sample ballots will be given?

11. How may an absentee ballot be secured and voted by employees on leave, absent from work because of illness and for other reasons?

12. Where, when and by whom will the final tally be held?

13. Who will be the final arbiter of any disputes concerning electioneering irregularities or the tabulation of votes?

14. Who will bear the expense of the election?

15. For what time period will the results of the election cover? If no bargaining representative is elected, when may another election be held? If a bargaining representative is elected, when and under what conditions may another election be held?(5)

Once the union or association has been recognized as the bargaining agent, it must be determined for how long that union will represent the employees. There may be a statutory date for termination or renewal. There may be a contractually agreed upon term. Clearly, both employer and employee share in the necessity for time control over the "life span" of a representative bargaining unit, and that must be balanced between too short and too long. Many statutes call for annual renewal--year-by-year-proof--of the representative status.

The election and designation of a specific bargaining unit occasionally needs clarification in each local setting. Two cases heard before the Nebraska Court of Industrial Relations serve as good illustrations of both latitude and constraint. In the matter of the City of Grand Island and the American Federation of State, County and Municipal Employees, AFL-CIO (1971), certain conclusions were pronounced. It was the city's desire to bargain with one unit. The employees wanted occupational differentiation; i.e., clerks, firefighters,

electrical workers, and so on, wanted each to be in their own union. With no statutory directive stipulating the necessity of a single union, the court found that workers may organize according to occupational categories, and governing boards must recognize each after elections have been held according to law.

In the International Association of Firefighters, AFL-CIO v. the City of Fremont, the CIR was asked to determine those employees who should be excluded from representation by virtue of the fact that they represented management. That is, the fire chief was excluded by mutual agreement, by what about such job titles as fire captain, fire marshall, and fire lieutenant? A study of job descriptions led the CIR to exlcude captains and marshalls, but to allow the inclusion of lieutenants in the union because they were principally firefighters and assumed other duties only in the absence of a captain.

Elections, in and of themselves, may not determine the constituency of the union. Objections to inclusiveness may be voiced by rank and file; or, as in the firefighter dispute, by the governing board, which in this instance, was a city council.

Proposals and Demands

After election comes recognition. After recognition comes the first step in the bargaining process, the presentation of proposals and demands to the board. The written list of proposals and demands is a formal presentation, characteristically done at the time required by the statute of each particular state.

This initial effort in the bargaining process rests upon a mutually accepted concept of good faith. This means that the parties will deal with each other openly, fairly and sincerely, from the time of initial contact until the contract is signed. It is a troublesome concept, not perfectly matched with the adversarial setting.

In the private sector, the National Labor Relations Board (NLRB) and the courts have built an extensive set of conditions for bargaining:

1. There must be a serious attempt to adjust differences and to reach an acceptable common ground.
2. Counter proposals must be offered when another party's proposal is rejected. This must involve the "give and take" or an auction system.
3. A position with regard to contract terms may not be constantly changed.
4. Evasive behavior during negotiations is not permitted.
5. There must be a willingness to incorporate oral agreements into a written contract.(6)

Failure of any of the above can become grounds for allegations of unfair labor practices because of failure of good faith.

Although good faith bargaining receives its most severe tests during the entirety of negotiations. it is an integral part of the proposal and demand phase, particularly. It is a term of relativeness; it abhors extravagance and exaggeration. How substantial, then, should the demands be? Should the union demand a 20% pay raise? Is that extravagant? What is the scope of proposal and demand which is within both the desires of the union and the concept of good faith? In anticipation of compromise, there is a tendency for both sides to exaggerate their position. Within such a planning framework for the entire bargaining session, proposals and counterproposals come to the verge of violating the concept of good faith.

Proposals and demands generate counterproposals. Compromises may emerge. Acceptance of positions must occur between the union and the governing board as the collective bargaining process operates. Confront, revise, reject, accept become the reactionary postures to the proposals and demands. Proposals are not developed in anticipation of immediate and total acceptance by the other side; they are written offers of position aimed at developing discussion. It is pointless, then, to make a proposal which involves an area of interest in which

a public board is proscribed from negotiating. Although these items vary from state to state, the following list includes items commonly considered non-negotiable.

1. Items not directly affecting the welfare of members of the negotiating unit.
2. Items with a primary function of determining educational policy (in schools).
3. Items which may encroach directly upon an area inherent to management, such as the hiring of personnel.(7)

The formulation and preparation of the proposals is customarily the responsibility of the persons who have been chosen or hired as employee representatives. These proposals, however, should come from the "grass roots" --from those nurses, firefighters, laborers or teachers who comprise that local union. As a normal part of the preparation-aspect, the employee representatives are expected to screen and refine the various proposals as they are gathered.

As soon as the concerns, desires, and priorities of the constituency have been identified, the written preparation of the proposals should commence. The proposals should be designed to support improved conditions for the membership.(8) Some proposals will need to be written out in full. Proposals in the form of amendments to existing contracts need only state those words which require changing or omitting. Others may simply require the rewriting or

clarification of an already established policy. Under no conditions should these proposals be silly or ridiculous, flippant or insincere; all should be as sensible as they can be made by the employee representatives. Revisions and amendments must be set forward with understanding of their meaning as one goal.

The demands, or proposals, if wisely formulated by the union, will conform to one or more of some such major union functions as union security, wage and effort bargain, individual employee security, or contract administration. Examination of numerous letters containing proposals and demands made by public employee unions to their employing boards reveals that the major interest is the wage and effort category. For example, for teachers that would mean the continuation and extension of the single salary schedule. Even though recognizing that such schedules do not create vested rights, teachers have found that they provide an excellent base from which to approach the initial wage demand. These schedules are not without advantage to the employing board, for they provide a base from which to start the budget planning process. Some data base is necessary because negotiations are conducted with relative goals in view.

Similarly, information from which employees or employer groups may speak to their particular case may be found in inter-occupational comparisons.

Table I

Inter Occupational Salary Comparison

Over Five Years, 1968-1972(9)

Occupational Group	Average Annual Rate of Increase
Maximum annual salary scales	
Police	8.3
Firemen	8.0
Teachers	5.8
Minimum annual salary scales	
Police	7.4
Firemen	7.3
Teachers	5.5
Consumer Price Index	4.6

The data from the table can be interpreted to mean several different things, depending upon the interests of a particular spokesman. That is, for the city manager, reporting on the personnel budget to a city council, the perspective might be that salaries indicate very strong compensation plans, by several comparisons. On the other hand, the data would very likely carry a different message to the bargaining team for the local teachers' association.

Many public employees are civil servants. Where does the civil service fit in the public employee bargaining setting? Civil service has a long

history as a job protection device. It satisfies one of the concerns of organized workers, and civil servants who are organized may find conflicts in negotiations. The use of the spoils system and job insecurity which such partiality promoted, caused employees to search for some technique which would remove government jobs from arena of political corruption. Providing continuity and stability in the services being performed, civil service has advantages from several vantage points. Legislatures have, from time to time, expanded the coverage of employees in that category. With the passage of time, civil service tends to become overly burdened by its own bureaucratic attempts at impartiality; included employees may find that the bureaucracy itself becomes a stumbling block to goal achievement through collective bargaining.(10)

It was the several Executive Orders which were sequentially issued by the three presidents of the sixties which so sharply accelerated the extension of public employment bargaining. Ironically, those orders, allowing for the organization of federal employees who were civil servants, applied to employees already enjoying some of the beneifts which have always been major goals of unions. It was not a perfect fit. In job settings other than the federal civil service, it has become apparent that collective bargaining, overlaid on civil service, merits special study because it is really a new and different kind of worker organization.

Negotiations

Negotiations is bargaining; bargaining is negotiations. Sides are identified and adversarial roles are assumed. In order to assure that those adversarial feelings do not attach to personalities and hamper job performance in the instructional setting, public governing boards are well advised to consider third parties who are outsiders to the classroom setting. In negotiations, cool calculations meet cool calculations.

Job performance protection must be attended; bitter feelings which may be aroused through negotiation table disputes must be kept separate from work settings. An organization in which, by its size, the union representative is also an employee in close work relationship with the administrator designated as the board's negotiator is bound to have trouble. The carryover from the bargaining table to the work setting, developed as a side effect in that earlier conflict, cannot be conducive to desirable job productivity. On the other hand, if there is substantial "organizational distance" between the negotiator for each side, their coming from within the same organization should not be counterproductive to the organization's work mission.

In those cases where common sense dictates that the public board should employ an outsider, and designate that person as negotiator, to whom should a

board turn? Where is there such talent as is needed? Many boards have turned to the ranks of attorneys, attracted by their familiarity with adversarial roles.

Some research indicates limitations upon negotiations in which boards are represented by outsiders. Over a three year period, from a single state sample of negotiating school districts, those not reaching contract agreement ranged from 8-14%. Among that group going to impasse, exactly half of the boards had employed attorneys as spokesmen. Among those boards reaching settlement and not going to impasse, attorneys were spokesmen for only about 15% of what might be termed "successful negotiating."(10) Other boards have sought assistance from within other professional groups. For example, college professors from such fields as communications, administration, and economics have represented boards on occasion.

The situation and information revealed, above, calls for some additional comment. First, it should be pointed out that although the boards may have protected the work setting from crippling hostilities by hiring outside, single purpose representatives, those outside representatives have not been particularly outstanding in bringing the bargaining to settlement and contract short of impasse. Second, the procedure is in sharp contrast to predominating practices in the private sector because the magnitude of the employment particular to each specific public bargaining endeavor is likely to be much, much smaller than

in a private sector counterpart--if indeed, it is even fair to think that there might be a counterpart. Public bargaining does not yet have that centralized characteristic in which a single union is involved with a representative of many employers, such as the United Auto Workers bargaining with the Ford Motor Company. For all the problems, there is good reason for "third persons" to be used in public bargaining. The most knowledgeable persons are to be found among the professional mediators, arbitrators, and conciliators. When matched against the fantastically sharp rise in public employment bargaining over the past decade, the number of such professionals is so small that they would be unobtainable to most boards, given even the most optimistic conditions about a public board's financial situation and professional negotiator inclination. Simply put, qualified third person negotiators are in short supply.

Over the next few years, public boards will likely continue to use their own administrators on special short-term assignment as negotiators, or they will hire nearby and available professionals of one sort or another who appear reasonably suitable to the task. Obviously, special direction, qualifications, and limitations must be made explicit by the employing board and accepted by the negotiator. The board must assure itself that job performance conflict is not being built through the negotiations process. Either arrangement, with the

"insider" or the"outsider" could be quite suitable and strongly supportive to the positive development of labor relations and enhancement of the organization's work mission, but whichever is chosen must bear intense scrutiny for its particular frailty.

These comments on an aspect of the collective bargaining setting have been focused upon the individual who works as the board s negotiator not only because that position merits some analysis on its own, but also because there is greater flexibility in selection to that position than in the union's representation. This latter is true because, with but very few exceptions, the finances behind the typical public governing board substantially exceeds the resources of the local union. Within the private sector there are many unions with awesome financial resources; to date, that is not true of most public employee unions. The union, then, has fewer alternatives than the board; it will have a local expert, who may sometimes also be an executive secretary of that local. More often than not, the union has no options--its representative will come from its ranks. Very likely, that representative will develop whatever bargaining skills are finally possessed through educational programs sponsored by state or national organizations. Proposals set forward for negotiation typically have merit of their own, but the level of success with which they are handled at the

table is heavily dependent upon the performers in that negotiations setting, too.

The question arises, how large should the employee group be when a board decides to hire an outside negotiator? It is quite a temptation to revert to numbers and declare that if a public board is bargaining with a unit representing 500 members, it should select from its own administrative staff a member to be given designation as negotiator. Approached in a slightly different way, it is likewise tempting to declare that if its personnel budget exceeds four million dollars, the organization may use its own personnel, and feel confident that in either case the adversary relationship of the bargaining table would have no job performance repercussions. But, really, should it be 500? How about 250? The truth is that no such number exists. Local public boards must be sensitive, assess their own situation, then act with the particulars of the situation used as the decision influencing factors.

Demands and proposals are sometimes made at inflated levels in order to expand the parameters of consideration. In public employment settings with elected boards, this technique may have more value than initially appears. That is, it is such a transparent ploy that the other side will readily recognize it as such. For public boards that have an intense interest in the financial

welfare and morale of their employees, there is also an electorate which must be addressed. Boards must face two ways. Strategically it may be clumsy, but politically it may be wise to propose to the outer parameter, then fall back to a compromise to which the other side may point with pride.

When it is time to go to the bargaining table, there are a number of tactics to consider. It is often wise to come to the first meeting with a great number of proposals reflecting problems of concern to the constituency. By preparing a large number of demands, many different segments of the membership can be satisfied; and, also, these demands allow room for negotiation. As necessary back up to such tactics, substantial preparation is an absolute must, with data supportive of each demand and some knowledge of cost and impact of each demand.(11)

With the start of bargaining, concessions are made, positions are changed. Some modifications come through the form of the counterproposal. A counterproposal has been defined as "...a formal reaction to a proposal or counterproposal by the other party and may be made at any time during the course of negotiation."(12) It may be used merely to balance the other side's demands. For example, if a union proposed some sort of reduction in the work week, a

counterproposal may be that if the union's proposal is accepted, a specified number of paid holidays would have to be eliminated.(13)

Counterproposals are as necessary as demands and proposals. They, too, are designed to allow room for bargaining. If used properly, counterproposals can supply the negotiator with a reasonable defense and at the same time contribute to the continuation of that very necessary two-way line of communication.(14)

The equity of pay problem has long been a problem in private industry. There, as a result of the great power in such unions as the UAW, unskilled workers have come to receive as much or more for their labor than do skilled craftsmen. In public employment, political patronage becomes a force mitigating against differentiation of pay. It is a factor which inevitably is considered as any public board considers settlement. The political patronage factor is one consideration which results in relative underpay for top personnel and overpay to personnel who are unskilled or who have little responsibility. Public employee strikes in such cities as New York and San Francisco, and publication of salary levels of unskilled employees which reveal inequities have caught the attention of observers of the public employment scene.(15) When municipal sanitation workers receive starting wages of $18,000 annually, and public school teachers in the same locale start at $9,000, the equity of pay problem stands out, and one explanation of influencing

factors is political patronage.

The thread running throught the entire process of proposal and demand negotiation must be good faith. Not particularly susceptible of precise definition, good faith can be subverted by either side--a violation of both the spirit and the letter of typical collective bargaining laws. Good faith does not necessarily mean that the parties will come to agreement. Impasse may be a consequence of negotiations which are conducted in good faith. Unfortunately, adding confusion to the situation, it must be frankly admitted that settlement may be a consequence of negotiations in which one or both parties used deception, subterfuge, or some other bad faith characteristic.

Hard bargaining does not indicate lack of good faith. In fact, it has been stated that

> If the state courts...adjudicating public employment disputes adopt reasoning similar to that developed in the private sector with respect to good faith bargaining...a government employer may bargain hard; and unless its offers to a union are flagrantly unreasonable or humiliating, it will not be found guilty of refusing to bargain in good faith.

Collective bargaining does not imply capitulation to all union demands. Even in the private sector, where the employer has no responsibility as guardian of the public welfare, there is no implication that capitulation to union demands is the only indicator of good faith.(16) But, for the process of collective bargaining in public employment to prevail, good faith--genuineness

and sensitivity--must be present as proposals and demands find their way to the negotiations table.

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